

Harm to the “Fabric of Society” as a Basis for Regulating Otherwise Harmless Conduct: Notes on a Theme from *Ravin v. State*

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I. INTRODUCTION

Shepard's Citations does not do justice to the Alaska Supreme Court's 1975 decision in *Ravin v. State*.¹ Other state courts consistently have rejected or ignored *Ravin*'s central holding—that adults enjoy a constitutional right to smoke marijuana in their homes.² Indeed, that holding, like so many other artifacts of the 1970s, now gives the impression of having been too much a product of its time.³ Nevertheless, *Ravin* represents an early and ambitious attempt to devise a method of constitutional analysis that denies independent weight to “notions of morality.”⁴ This attempt, though only partly successful, holds important lessons for courts that have come late to the same view of morality's place in judicial review.⁵

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1. *Ravin v. State*, 537 P.2d 494 (Alaska 1975).

2. See, e.g., *State v. Murphy*, 570 P.2d 1070, 1073 (Ariz. 1977); *Laird v. State*, 342 So.2d 962, 963 (Fla. 1977); *State v. Kincaid*, 566 P.2d 763, 765 (Idaho 1977); *NORML v. Scott*, 383 N.E.2d 1330, 1333 (Ill. App. 1978); *State v. Chrisman*, 364 So.2d 906, 907 (La. 1978); *Marcoux v. Attorney Gen.*, 375 N.E.2d 688, 691 (Mass. 1978); *State v. Kells*, 259 N.W.2d 19, 24 (Neb. 1977); *People v. Shepard*, 409 N.E.2d 840, 843 (N.Y. 1980); *State v. Anderson*, 558 P.2d 307, 309 (Wash. App. 1976).

3. The Alaska courts have never overruled *Ravin*. In 1990, though, Alaskans voted by popular referendum to re-criminalize the possession of marijuana. See *Mowing the Grass (Alaska Recriminalizes Possession of Marijuana)*, TIME, Nov. 19, 1990, at 47. The statute that is the outgrowth of this referendum, ALASKA STAT. § 11.71.060, has not been tested in Alaska's appellate courts, probably because the Alaska Attorney General has declined to enforce it. The statute was declared unconstitutional by an Alaska trial court judge in *State v. McNeil*, No. 1KE-93-947 (Alaska Dist. Ct. Oct. 29, 1993).

4. *Ravin*, 537 P.2d at 511.

5. These courts now include the Supreme Court. Last term, in *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), the Court held: “the fact that the governing majority in a State has

At the core of the *Ravin* decision lies the recognition that “notions of morality, propriety, or fashion” cannot by themselves justify the assertion of government control over the conduct of individuals. The justices who joined the majority opinion in *Ravin* expressed their *personal* opposition to the use of marijuana and other “psychoactive drugs.”⁶ And they said that this opposition was grounded in their *personal* conviction that “the duty to live responsibly, for our own sakes and for society’s,” could best be fulfilled “without the use of psychoactive substances.”⁷ However, they concluded that these convictions fell within the realm of “notions of morality, propriety, or fashion” and so could not justify Alaska’s statutory prohibition on use of marijuana.⁸ The “authority of the state to exert control over the individual,” they said, extends only to activities that have tangible adverse effects on the actor herself,⁹ other individuals, or society at large.¹⁰

If *Ravin*’s core principle seems banal, it was not when it was announced. Eleven years after *Ravin*, the United States Supreme Court would hold, in *Bowers v. Hardwick*, that “the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable” provided an adequate justification for a Georgia statute criminalizing homosexual sodomy.¹¹ The Court said,

traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.” *Id.* at 2483 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

6. *Ravin*, 537 P.2d at 511.

7. *Id.* at 511–12.

8. *Id.* at 509.

9. *Id.* *Ravin* itself actually contains two inconsistent answers to the question whether harm to the actor herself qualifies as cognizable harm. At one point, the court in *Ravin* expressed support for “the general proposition that the authority of the state to exert control over the individual extends only to activities of the individual *which affect others or the public at large.*” *Id.* (emphasis supplied). But the court in *Ravin* also relied on an alternative formulation of the right, saying “[n]o one has an absolute right to do things in the privacy of his own home which will affect *himself* or others adversely.” *Id.* at 504 (emphasis supplied). Three years after *Ravin*, in *State v. Erickson*, the Alaska Supreme Court resolved the tension between these two formulations. 574 P.2d 1 (Alaska 1978). In concluding that the ingestion of cocaine was not shielded by the right to privacy, the court assumed that harm to the actor herself could justify state intervention. *Id.* at 22. In subsequent cases, the Alaska courts have continued consistently to take the view that harm to the actor herself is cognizable harm. See, e.g., *Gibson v. State*, 930 P.2d 1300, 1302 (Alaska Ct. App. 1997); *Harrison v. State*, 687 P.2d 332 (Alaska Ct. App. 1984); *Sampson v. State*, 31 P.3d 88, 95 (Alaska 2001). See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1372–73 (2d ed. 1988) (“The intuition that one’s safety is wholly one’s own business is simply too far out of phase with the reality of our interdependent society to find any plausible expression in our constitutional order.”).

10. *Ravin*, 537 P.2d at 504.

11. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), *overruled by* *Lawrence v. Texas*, 123 S.Ct. 2472 (2003).

"[t]he law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."¹²

Alaska courts have not been "very busy indeed" invalidating criminal statutes, perhaps because most laws "representing essentially moral choices" also are, not coincidentally, designed to prevent individuals from inflicting tangible harm on themselves or others.¹³ But *Ravin*'s effort to eliminate mere "notions of morality" from judicial review—and its concomitant insistence upon evidence of tangible harm to persons—has forced the Alaska Supreme Court, in *Ravin* and in subsequent decisions, to explore the ill-defined boundaries between private morality and the public welfare. Among the insights borne of these efforts is the court's recognition in *Ravin* that the possibility of indirect harm to "the fabric of our society"¹⁴ might sometimes justify the assertion of government control over individuals.

This recognition, as I will argue, reintroduces morality into judicial review, albeit in a very different role than it played in, say, *Bowers v. Hardwick*. The simple, habitual, moral reaction patterns that ordinarily prevent human beings from injuring one another are among the most important fibers in the "fabric of society." And though, under *Ravin*, these reaction patterns have no legally cognizable value in themselves, they have instrumental value insofar as they prevent tangible harm to persons. Thus, society's interest in preserving these reaction patterns could conceivably justify regulating otherwise harmless conduct.

In this article, I will explore the possibility that harm to the fabric of society provides the best justification for some statutes that prohibit otherwise harmless conduct. After some preliminary remarks about why the cognizability of harm is important, I will consider three illustrations: first, the incest statutes, which, even in progressive states like Alaska and New York, prohibit a wide array of basically harmless conduct; second, a Massachusetts statute regulating the use of human silhouettes in target practice;¹⁵ and finally, legislation that would prohibit the medical procedure known as "partial-birth abortion."¹⁶

12. *Id.* Compare *Gryczan v. State*, 942 P.2d 112, 125–26 (Mont. 1997) (laws prohibiting consensual homosexual activity cannot be justified by reference to the government's desire "to improve the morality of individuals").

13. See, e.g., *Sampson v. State*, 31 P.3d 88 (Alaska 2001) (rejecting constitutional challenge to Alaska's statutory prohibition on assisted suicide); *State v. Erickson*, 574 P.2d 1 (Alaska 1978) (rejecting constitutional challenge to statute prohibiting use of cocaine).

14. *Ravin*, 537 P.2d at 509.

15. MASS. GEN. LAWS ch. 140, § 131(a).

16. H.R. 4965, 107th Cong., 2d Sess. (2002).

After discussing these illustrations, I will undertake a close analysis of the general argument for the preservation of moral reaction patterns. Though I will conclude that the argument generally is valid, I will not offer any opinion as to whether, with respect to any particular statute, the argument ought to carry the day. The ultimate validity of the laws in question, particularly the ban on partial-birth abortions, involves considerations well beyond the scope of this article.

II. WHY QUESTIONS ABOUT THE COGNIZABILITY OF HARM ARE IMPORTANT

Questions about the cognizability of harm play two separate roles in constitutional privacy analysis. First, and most obviously, these questions figure in the determination of whether, in a particular instance, government intrusion upon a constitutionally protected activity is justified by a substantial or compelling government interest. In this setting, questions about the cognizability of harm *succeed* the identification of the constitutionally protected sphere of conduct. This was the case, for example, in *Powell v. State*,¹⁷ where the Georgia Supreme Court struck down the very sodomy statute that had been upheld by the United States Supreme Court twelve years before in *Bowers v. Hardwick*.¹⁸ Only after determining that sodomy "falls within the area protected by the right to privacy"¹⁹ did the Georgia court undertake to determine whether the government interests asserted by the Georgia Attorney General, including the "furtherance of social morality," were legally cognizable.²⁰ They were not.²¹

But questions about the cognizability of harm also play a second, less obvious role in constitutional privacy analysis, at least in Alaska. From *Ravin* onward, Alaska's courts have frequently acknowledged that the potential consequences of a particular activity determine in part whether society is prepared to recognize it as "private" in the first place. As the court said in *Ravin*, "one aspect of a private matter is that it is private, that is, that it does not adversely affect persons

17. *Powell v. State*, 510 S.E.2d 18, 26 (Ga. 1998).

18. *Bowers*, 478 U.S. at 196.

19. *Powell*, 51 S.E.2d at 24.

20. *Id.* at 25.

21. *Id.* at 26. Questions about the cognizability of harm play this role in Alaska's courts too. In Alaska, the determination that a particular activity is protected by the right to privacy triggers the application of one of several balancing tests. Depending upon the importance of the privacy right at stake, the Alaska courts may require only a "close and substantial relationship" between the public welfare and the intrusion upon privacy, *Ravin*, 537 P.2d at 511, or, alternatively, may require that the challenged regulation advance a "compelling state interest" by the "least restrictive" possible means, *Messerli v. State*, 626 P.2d 81, 84 (1980). See generally *Valley Hosp. Ass'n v. Mat-Su Coalition for Choice*, 948 P.2d 963, 971 n.17 (Alaska 1997).

beyond the actor, and hence is none of their business."²² Under this approach, the fact that, say, sodomy does not inflict cognizable harm on the actor or others is an important factor in the threshold determination that it is "private."

This pragmatic, effects-focused approach to privacy analysis was applied, for example, in *Hilbers v. Municipality of Anchorage*, where the Alaska Supreme Court reviewed a municipal ordinance regulating massage parlors.²³ In *Hilbers*, the court said an activity qualifies as private only if an individual's subjective expectation of privacy in the activity is "one that society is prepared to recognize as 'reasonable.'"²⁴ Whether an expectation of privacy qualifies as "reasonable" depends, of course, on the costs and benefits of treating the activity as private.²⁵ This approach to privacy was summarized in *Luedtke v. Nabors Alaska Drilling, Inc.*, where the Alaska Supreme Court explained that the "boundaries" of the right to privacy cannot be defined without resort to balancing of interests:

[T]here is a sphere of activity in every person's life that is closed to scrutiny by others. The boundaries of that sphere are determined by balancing a person's right to privacy against other public policies, such as 'the health, safety, rights and privileges of others.'²⁶

The Alaska courts' reliance on effects analysis in defining a protected sphere of private activity is justified, in part, by the inadequacy of the alternatives. Though historical analysis has an important role to play in privacy analysis,²⁷ heavy reliance on historical analysis would be inconsistent with the Alaska courts' flexible approach to constitutional interpretation, which is based on the assumption that "what was practical historically is not necessarily adequate to the needs of our times."²⁸ The other noteworthy

22. *Ravin*, 537 P.2d at 504 (emphasis in original).

23. *Hilbers v. Municipality of Anchorage*, 611 P.2d 31, 42 (Alaska 1980).

24. *Id.* at 42 (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).

25. See *State v. Glass*, 583 P.2d 872, 880 (Alaska 1979) (standard requires court to balance "the often competing interests of society and the individual").

²⁶*Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1135-36 (Alaska 1989) (quoting *Ravin*, 537 P.2d at 504). See also *Messerli v. State*, 626 P.2d 81, 83 (Alaska 1981) (discussing right to privacy: "[i]n effect, there must be here a balancing of conflicting rights and interests").

27. See, e.g., *Sampson v. State*, 31 P.3d 88, 94-95 (Alaska 2001); *Friedman v. District Court*, 611 P.2d 77, 78 (Alaska 1980).

28. *Baker v. City of Fairbanks*, 471 P.2d 386, 396 (Alaska 1970). Exclusive reliance on historical analysis might, for example, lead to the vindication of criminal laws forbidding homosexual sodomy. Historical analysis formed the principle basis for the Supreme Court's decision in *Bowers v. Hardwick*, 478 U.S. at 192-94:

alternative to balancing is a kind of navel-gazing conceptual reasoning, wherein one considers whether the activity *seems* “intimate” or “personal.” But, as Professor Cass Sunstein has pointed out, “[t]erms such as ‘intimate’ and ‘personal’ provide little help. They tend to be conclusions masquerading as analytic devices.”²⁹ Thankfully, the Alaska courts rarely seem to have concerned themselves with whether a particular activity seems “personal” or “intimate.” Instead, in attempting to differentiate private conduct from non-private conduct, the courts have focused on the likely effects of foreclosing government regulation of the activity.

It is the necessity of balancing—both in defining what is “private” and in judging the legitimacy of government intrusion on this private sphere—that makes the cognizability of harm so important. The mere requirement of balancing is, in itself, relatively free of *content*; if the right to privacy consisted only of a balancing requirement, then implementation of the right to privacy would nearly place the courts in the position of a super-legislature, albeit a super-legislature that was required to accord substantial deference to factual conclusions of the legislature itself. The various balancing tests articulated by the courts supply only the *structure* of the right to privacy. The right’s *content* is supplied in large measure by limitations on the forms of harm that qualify as counterweights to individual autonomy.³⁰

III. HARM AND THE FABRIC OF SOCIETY

Though *Ravin* suggests that harm to the social fabric sometimes will justify government intervention, the decision itself does not

Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.

29. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 88 (1999) (addressing question of assisted suicide).

30. Limitations on the cognizability of harm also form the core of First Amendment analysis, though here too courts often are distracted by the task of identifying and applying the appropriate balancing test. Specifically, the core of First Amendment jurisprudence is the principal that, except in a few very narrow circumstances, a government cannot justify laws restricting speech by reference to harm arising from the communicative impact of the activity. A recent illustration of this principle can be found in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2001), where the Supreme Court held that a statutory prohibition on virtual child-pornography could not be justified by concerns that the pornography would “whet the appetites” of potential pedophiles. See also *TRIBE*, *supra* note 9, at 790 (“if the constitutional guarantee [of free speech] is not to be trivialized, it must mean that government cannot justify restrictions on free expression by reference to the adverse consequences of allowing certain ideas or information to enter the realm of discussion and awareness”).

elaborate on this suggestion at any length.³¹ The decision acknowledges that “the authority of the state to control the activities of its citizens is not limited to activities which have a present and immediate impact on the public health or welfare.”³² Then it acknowledges that the possibility of harm to “the fabric of society” might, in some instances, justify the state’s efforts to control the activities of its citizens:

It is conceivable, for example, that a drug could so seriously develop in its user a withdrawal or amotivational syndrome, that widespread use of the drug could significantly debilitate the fabric of our society. Faced with a substantial possibility of such a result, the state could take measures to combat the possibility. The state is under no obligation to allow otherwise ‘private’ activity which will result in numbers of people becoming public charges or otherwise burdening the public welfare.³³

This passage analyzes just one particular form of harm to the social fabric: deterioration in motivation or industriousness (or, one could say, in the “work ethic”) among members of a particular group. Of course, the passage is introduced by the words “for example,” and it makes sense to assume that deterioration in motivation or industriousness is but one of many forms that cognizable harm to the social fabric might take. After all, the possibility of drug users burdening the public is a relatively indirect, and relatively undisturbing, form of harm. By comparison, a debilitation of the social fabric that somehow led to the infliction of physical harm on others would be far more troubling, and far more deserving of legislative intervention.

Thus, in *Ravin* itself the court took pains to emphasize that the use of marijuana would not lead to the infliction of physical harm on others, citing evidence “that marijuana inhibits ‘the expression of aggressive impulses by pacifying the user, interfering with muscle coordination, reducing psychomotor activities and generally producing states of drowsiness, lethargy, timidity and passivity.’”³⁴ The court

31. Though *Ravin* has been the subject of a good deal of comment, the comment generally has focused on other aspects of the decision; none of the commentators has attempted to elaborate on the “social fabric” rationale. See, e.g., Ronald L. Nelson, *Welcome to the “Last Frontier,” Professor Gardner: Alaska’s Independent Approach to State Constitutional Interpretation*, 12 ALASKA L. REV. 1, 18–20 (1995); Susan Orlansky & Jeffrey Feldman, *Justice Rabinowitz and Personal Freedom: Evolving a Constitutional Framework*, 15 ALASKA L. REV. 1, 8–12 (1998); Andrew Winters, Note, *Ravin Revisited: Do Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of Their Homes?* 15 ALASKA L. REV. 315 (1998).

32. *Ravin v. State*, 537 P.2d 494, 509 (Alaska 1975).

33. *Id.*

34. *Id.* at 507.

assumed that marijuana might be subject to regulation if, somehow, it made the user more likely to inflict harm on others. The same assumption formed one part of the basis for the Alaska Court of Appeals' decision upholding Alaska's "local option" law, which grants municipal governments the option of regulating the distribution and importation of alcoholic beverages.³⁵ The Court of Appeals relied on the fact that alcoholic beverages indirectly contribute to crime and family violence—tangible harms to other persons.³⁶

In what follows, I will argue that one aspect of the "fabric of society" is various moral reaction patterns that inhibit conduct that is itself harmful to other persons. And I will argue that state control of otherwise private—and otherwise harmless—activities sometimes is justified for the sake of preserving these reaction patterns. I will begin this argument by analyzing incest statutes from Alaska and elsewhere.

IV. THE INCEST STATUTES

Alaska's incest statute, which was adopted three years after *Ravin* as part of a major criminal code revision,³⁷ provides that:

[a] person commits the crime of incest if, being 18 years of age or older, that person engages in sexual penetration with another who is related, either legitimately or illegitimately, as (1) an ancestor or descendant of the whole or half blood; (2) a brother or sister of the whole or half blood; or (3) an uncle, aunt, nephew, or niece by blood.³⁸

Like many other incest statutes,³⁹ Alaska's statute lacks any prohibition on sexual intercourse among persons who are related by adoption or marriage.⁴⁰ Thus, a stepparent who engages in sexual intercourse with his or her stepchild is not guilty of incest under the statute, nor is an adoptive parent who engages in intercourse with the adopted child.

Statutes prohibiting incest generally are thought to be justified either (1) by the danger that children borne of intercourse among immediate relatives will inherit genetic defects,⁴¹ or (2) by the danger

35. *Harrison v. State*, 687 P.2d 332 (Alaska Ct. App. 1984).

36. *Id.* at 338.

37. 1978 Alaska Sess. Laws ch. 166, § 3.

38. ALASKA STAT. § 11.41.450. Incest is a class C felony, § 11.41.450(b), punishable by up to five years' imprisonment, § 12.55.125(e).

39. See MODEL PENAL CODE § 230.2, cmt. at 401 (1985) (in most states, "adopted children were not included within the reach of incest laws").

40. ALASKA STAT. § 11.41.450.

41. See MODEL PENAL CODE § 230.2, cmt. at 402-05. There appears to be some question whether this "eugenics" rationale for incest statutes is even legitimate. See *Commonwealth v.*

that intercourse among immediate relatives will involve sexual imposition by an adult upon a child.⁴² From the Alaska statute's exclusive focus on sexual relations among blood relatives, it may be inferred that the Alaska Legislature was principally concerned with the first problem. The problem of sexual imposition was addressed by the legislature separately, in the revised code's sexual abuse statutes, whose various classifications were designed to reflect the heightened danger of sexual imposition that exists when the offender and victim are members of the same household.⁴³ Thus, in *Harmon v. State*, where a defendant argued that his convictions for both incest and sexual abuse of a minor amounted to double jeopardy, the Alaska Court of Appeals concluded that the incest statute and the sexual abuse statute were designed to advance different societal interests.⁴⁴

But if indeed Alaska's incest statute was designed exclusively to prevent the birth of children with genetic defects, the statute is vastly overbroad. The statute broadly prohibits "sexual penetration," even though three forms of conduct classified by statute as "sexual penetration"—cunnilingus, fellatio, and anal intercourse—involve very little danger of procreation.⁴⁵ Further, the statute does not differentiate heterosexual sex from homosexual sex, which involves no danger whatever of procreation.⁴⁶ Finally, the statute contains no exception for sexual intercourse by or with a person who is infertile.⁴⁷

Nor is Alaska's incest statute at all unusual in this respect. New York's incest statute, for example, prohibits sexual relations with an ancestor, descendant, brother or sister of either whole or half blood, uncle, aunt, nephew, or niece.⁴⁸ The statute does not reach sex with persons who are relatives by adoption or marriage.⁴⁹ But it does reach both sexual intercourse and "deviate sexual intercourse," which is

Smith, 728 N.E.2d 272, 277 (Mass. 2000) (characterizing "eugenics rationale" for incest statute as "debatable"). It seems unlikely that the government would be justified generally in prohibiting sexual intercourse among persons whom it deems to be genetically incompatible.

42. See MODEL PENAL CODE § 230.2, cmt. at 407.

43. See ALASKA STAT. §§ 11.41.434, 11.41.436, 11.41.438. Under § 11.41.434, for example, an adult male who engages in sexual intercourse with a 17-year-old girl is guilty of first-degree sexual abuse of a minor if he is "the victim's natural parent, stepparent, adopted parent, or legal guardian." If instead the girl is a stranger to him, his conduct is not a crime at all.

44. *Harmon v. State*, 11 P.3d 393, 395 (Alaska Ct. App. 2000).

45. ALASKA STAT. § 11.81.900(b)(58) (defining "sexual penetration" as "genital intercourse, cunnilingus, fellatio, anal intercourse, or an intrusion, however slight, of an object or any part of a person's body into the genital or anal opening of another person's body").

46. ALASKA STAT. § 11.41.450.

47. *Id.*

48. N.Y. PENAL LAW § 255.25.

49. *Matter of Adoption of Adult Anonymous*, 435 N.Y.S.2d 527 (Family Ct. Kings Co. 1981).

defined to include both anal and oral intercourse.⁵⁰ What is more, this seeming anomaly—the inclusion of “deviate sexual intercourse” within the scope of a statute apparently intended to prevent inbreeding—cannot be attributed to mere carelessness. As originally adopted in 1965, New York’s incest statute prohibited only vaginal intercourse.⁵¹ The New York State Legislature amended the statute in 1984 to include “deviate sexual intercourse” within its prohibitions.”⁵²

These statutes’ breadth cannot be justified (as statutory breadth often is) by “practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.”⁵³ This is not a case where it would be impossible, or even difficult, to draft a workable rule that would make an exception for cases where the activity was harmless. The drafter merely would, in the case of Alaska’s statute, substitute the word “intercourse” for “penetration” and would create exceptions for cases where both actors were of the same sex and cases where one or both was infertile. Nor would this amended statute be substantially more difficult to enforce than the existing statute. This is not a case, in other words, where it would be impossible for juries to differentiate cases within the exceptions from cases outside the exceptions.⁵⁴

Neither, of course, is it an answer simply to assert that incest is immoral. This is the very gambit that is rightly foreclosed by *Ravin*.⁵⁵ The mere fact that a majority of Alaskans consider incest immoral does not differentiate incest from, say, homosexuality.⁵⁶ Indeed, in

50. N.Y. PENAL § 255.25; § 130.00(2) (defining “deviate sexual intercourse”).

51. 1965 N.Y. Laws ch. 1030.

52. 1984 N.Y. Laws ch. 649, § 1.

53. *Colten v. Kentucky*, 407 U.S. 104, 110 (1972).

54. Concerns about notice and enforceability provide the explanation for much of the generality in criminal statutes. It is trivially true that most criminal statutes command adherence to general rules, rather than commanding just that persons refrain from conduct whose costs outweigh—or grossly outweigh—its benefits. It is no defense to murder that society, in the long run, will be much better off without the victim. Nor is it a defense to bribery that the bribe secured the enactment of a law that will be overwhelmingly beneficial to society. Nor, finally, is it a defense to perjury that the perjury was necessary to secure the acquittal of a defendant who, though guilty, would contribute greatly to society if he remained free. The generality of *these* rules need not be justified by resort to underlying moral reaction patterns. They can be justified by the fact that murder, bribery, and perjury nearly always are harmful, rather than beneficial, and the fact that it would be impossible to create a workable exception that would identify just those cases where the conduct was beneficial to society in the long run.

55. *Ravin*, 537 P.2d at 509.

56. In 1998, Alaskans voted overwhelmingly to adopt a constitutional amendment providing that “a marriage may exist only between one man and one woman.” ALASKA CONST. art. I, § 25. See also Liz Ruskin, *Gay Marriage Ban Approved*, ANCHORAGE DAILY NEWS, Nov. 4, 1998, at A1. The amendment was passed in response to a decision by an Alaska Superior Court judge holding that each person has a fundamental right to choose his or her life partner,

Bowers v. Hardwick, the Supreme Court's refusal to invalidate Georgia's criminal sodomy statute was based in part on a concern that doing so would set the Court on a slippery slope that would lead to, among other things, the invalidation of laws forbidding incest:

And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.⁵⁷

What, then, can be the justification for broadly prohibiting incest? The best answer, I think, lies in the social utility of the traditional aversion to incest. But for the existence of this aversion, sexual abuse of young girls by their biological fathers would be more common than it is. The traditional aversion to incest is deeply rooted and durable, and so prevents abuse that would not be prevented by the independent moral and legal proscription of sexual imposition. Thus, society is better off trying to preserve this traditional aversion—whatever its shortcomings—than in trying to replace it with a narrower, more enlightened aversion to the production of genetically defective offspring. After all, an aversion to the production of defective offspring would not prevent fathers from engaging in oral or anal intercourse with their daughters. Further, it is anyone's guess whether the government would be successful in inculcating in its citizens a truly visceral aversion to the production of genetically defective offspring. No one can be encouraged by government's rather limited success in inculcating in adult males an aversion to sexual imposition upon unrelated teenage girls.⁵⁸

This argument ought to have *some* intuitive appeal, given the tremendous costs of sexual abuse. Most of us would agree, I think, that a narrowing of the incest statute could not possibly be worthwhile if it resulted in even a few more girls being deprived of their

whatever the partner's sex. *Brause v. Bureau of Vital Statistics*, Case No. 3AN-95-6562 CI, 1998 WL 88743, at *4 (Alaska Super. Ct. Feb. 27, 1998).

57. *Bowers v. Hardwick*, 478 U.S. 186, 195–96 (1986), *overruled by* *Lawrence v. Texas*, 123 S.Ct. 2472 (2003); *see also Lawrence*, 123 S.Ct. at 2490 (Scalia, J., dissenting) (arguing that majority's decision eventually would lead to the invalidation of laws forbidding incest).

58. This sort of argument could not be used to justify a law that was designed to preserve an aversion to homosexuality, any more than it could be used to justify a law designed to cultivate, say, an aversion to sexual relations with brown-eyed persons. Society's interest in preventing sexual imposition would not be served by just any random aversion that narrows the universe of sexual partners. The utility of the aversion to incest arises from the fact that it is finely-tuned to prevent sexual imposition in just those situations where proximity and availability makes the danger of sexual imposition the greatest.

childhoods.⁵⁹ This argument also ought to evoke skepticism in any reader who shares my liberal convictions; for we have already acknowledged that among the acts prohibited by the incest statute is an identifiable class of acts that are not themselves harmful. Moreover, we have acknowledged that it would be practicable to draft a statute that excludes these acts from the scope of the prohibition, and that it would also be practicable to enforce such a narrower prohibition. It makes sense to wonder, then, whether the general form of this argument somehow is illegitimate. Before addressing this question, we first will consider two illustrations that are more specific: a Massachusetts target-shooting regulation and legislation regulating partial-birth abortion.

V. TARGET-SHOOTING AND SOME RELATED PROBLEMS

Most of us share a broad aversion to physical violence that is as strong and deeply rooted as the aversion to incest. This aversion often is obscured in our daily lives, perhaps because we rarely confront extreme physical suffering directly, or perhaps because our perception of suffering often is affected by emotions like anger (at, say, a wartime enemy). But where we confront extreme physical suffering without the comfort of distance or anger, the experience of the visceral aversion to violence can be overwhelming. Think back to those occasions when you have confronted an injured animal; say, a dog that has been run-over and that is struggling to regain its feet, or a goose that is trying to fly despite a broken neck.⁶⁰

The preservation of the aversion to physical violence supplies the best justification for a law very recently challenged in *Gun Owners' Action League v. Swift*.⁶¹ The Massachusetts statute at issue in *Gun Owners* regulated target-shooting at Class A licensed gun clubs by prohibiting "shooting at targets that depict human figures, human effigies, human silhouettes or any human images thereof, except by

59. This reckoning of the costs of child abuse is Nabokov's. See VLADIMIR NABOKOV, *LOLITA* 283 (Vintage Books 1989) ("Unless it can be proven to me—to me as I am now, today, with my heart and my beard, and my putrefaction—that in the infinite run it does not matter a jot that a North American girl-child named Dolores Haze had been deprived of her childhood by a maniac, unless this can be proven (and if it can, then life is a joke), I see nothing for the treatment of my misery but the melancholy and very local palliative of articulate art.").

60. In using animal examples to refine this aversion to its essence, I am following ethologist Konrad Lorenz. See KONRAD LORENZ, *ON AGGRESSION* 208 (transl. Latzke 1966) ("No sane man would even go rabbit-hunting for pleasure if the necessity of killing his prey with his natural weapons [i.e., his hands] brought home to him the full emotional realization of what he is actually doing.").

61. *Gun Owners' Action League v. Swift*, 284 F.3d 198 (1st Cir. 2002), *cert. denied*, 123 S.Ct. 121 (2002).

public safety personnel performing in line with their official duties.”⁶² The Gun Owners Action League, among others, challenged the constitutionality of this prohibition. It argued that shooting at human silhouettes is expressive conduct entitled to first amendment protection.⁶³

The First Circuit upheld that law without resolving the question whether target-shooting is expressive conduct entitled to first amendment protection. The court held that, assuming the law affected protected expression, it still was content-neutral—the law applied equally to persons who would shoot at pictures of tyrants and those who would “shoot at images of advocates of freedom.”⁶⁴ Because it was content-neutral, the law would pass constitutional muster so long as it was “narrowly tailored to serve a significant governmental interest.”⁶⁵ The court held that the law “does serve a significant government interest,” namely “to stop target practice that arguably increases the practitioner’s capacity to shoot human beings.”⁶⁶

By “capacity to shoot human beings,” the First Circuit meant “proficiency” or “skill” in shooting at human beings, rather than the *moral* capacity to shoot at human beings. The court said: “A person who has practiced shooting at a human-shaped target will likely be more *proficient* at shooting humans than a person who has had to practice at a circular target.”⁶⁷ But the difference for constitutional purposes is slight. Whether one views proficiency or cold-bloodedness as the principal concern, the rationale for the statute is basically the same: the act is prohibited because it is thought to produce a particular condition in the actor, which would, in turn, make the actor more dangerous.

What is more, the moral capacity argument better reflects the actual purpose of the statute. The Massachusetts Legislature almost certainly did not hope merely that persons who were denied an opportunity to shoot at human images would be more likely to *miss* when shooting at real human beings. Instead, the legislature probably hoped that persons who were denied an opportunity to shoot at human

62. MASS. GEN. LAWS ch. 140, § 131(a).

63. *Gun Owner’s Action League*, 284 F.3d at 210 (“One plaintiff, Outdoor Message, Inc., distributes a target with the image of Adolph Hitler on its front, and an account of Hitler’s restrictions on firearm use on the back. Those who buy the target shoot at the image of Hitler in order to express their opposition to tyranny and restrictions on gun use, and other political messages.”).

64. *Id.* at 211.

65. *Id.* at 211 – 12.

66. *Id.* at 211, 212.

67. *Id.* (emphasis added).

images would be less likely to *shoot* at human beings in the first instance. This is not an unreasonable hope. Most of us would find it difficult to shoot a gun at a human being.⁶⁸ Shooting at a human image might dull this aversion.

Arguments based on the social utility of the moral aversion to physical violence are not unprecedented. In 1981, for example, the Appeals Court of Massachusetts relied on roughly this rationale in upholding a statute that prohibited cruelty to animals.⁶⁹ The court concluded that the statute was justified to preserve the "humanitarian" aversion to violence, stating "[t]hese statutes are 'directed against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those acts.'"⁷⁰ The Utah Supreme Court adopted a similar rationale in rejecting a constitutional challenge to Utah's animal cruelty statute:

Whatever one's personal views may be of such matters, the legislative authority of our state has determined as a matter of public policy that such conduct is so involved in public morals and welfare that it has made cruelty to animals a crime and included therein the causing of one animal to fight with another. . . . [W]e are in agreement with the expression of respected authorities that legislation against such practices as the fighting of animals is justified for the purpose of regulating morals and promoting the good order and general welfare of society.⁷¹

If these courts can be faulted for refusing to assign any legal weight to the interests of the animals themselves—and I think they

68. In Max Frisch's *I'M NOT STILLER*, the narrator and protagonist (who concededly is very unreliable) offers this explanation of his (Stiller's) failure to shoot at approaching Fascist soldiers:

He hated the Fascists, otherwise he wouldn't have volunteered to fight in the Spanish Civil War; but that early morning on the Tajo, when Stiller first came face to face with the hated foe, he saw the four Fascists as human beings, and he found it impossible to shoot at human beings, he couldn't do it. That was all.

MAX FRISCH, *I'M NOT STILLER* 123 (transl. Bullock 1958).

69. *Knox v. Mass. Soc'y for Prevention of Cruelty to Animals*, 425 N.E.2d 393, 396 (Mass. App. Ct. 1981).

70. *Id.* (citation omitted).

71. *Peck v. Dunn*, 574 P.2d 367, 369 (Utah 1978) (footnotes omitted). See also *West Valley City v. Streeter*, 849 P.2d 613, 615 (Utah Ct. App. 1993) (quoting same); *Ill. Gamefowl Breeders Ass'n v. Block*, 389 N.E.2d 529, 532-33 (Ill. 1979) (state law prohibiting activities related to sport of animal fighting is a valid exercise of state's police power to protect and promote the general welfare of its citizens); *People v. Reed*, 176 Cal. Rptr. 98, 103, 122 Cal. App. 3d Supp. 10, 36 (Cal. App. Dep't Super. Ct. 1981) (law prohibiting neglect of animals is a valid exercise of state's police power).

can—they *cannot* be faulted for perceiving a connection between cruelty to animals and violence toward human beings. Recent studies have demonstrated a correlation between cruelty to animals and domestic violence.⁷² Thus, it is not unreasonable to suppose, as these courts apparently did, that participation in cruelty to animals dulls the ordinary human aversion to violence, and that the dulling of this aversion makes an individual more dangerous to other human beings.

A similar—and, I would argue, related—argument formed one part of the United States Supreme Court's rationale for upholding Washington State's prohibition on physician-assisted suicide in *Washington v. Glucksberg*.⁷³ The Court said that the prohibition was justified in part by the state's "interest in protecting the integrity and ethics of the medical profession."⁷⁴ The Court also quoted the American Medical Association's Code of Ethics for the proposition that "[p]hysician assisted suicide is fundamentally incompatible with the physician's role as healer."⁷⁵ This is a powerful point, which is independent of other rationales for upholding the ban on assisted suicide. Even if one otherwise were inclined to conclude that physician-assisted suicide sometimes is justified, one still would be right to distrust a physician who could bring herself to kill her patients. The physician's actions, though legal and though perhaps even justified from a strictly utilitarian perspective, would dull her respect for human life.⁷⁶ This acquired ruthlessness would, in turn, make her dangerous to her patients.⁷⁷

72. See F. R. Ascione, *The Abuse of Animals and Domestic Violence: A National Survey of Shelters for Women Who Are Battered*, 5 *SOCIETY AND ANIMALS* 205-218 (1997); E. DeViney, J. Dickert & R. Lockwood, *The Care of Pets Within Child Abusing Families*, 4 *INTERNATIONAL JOURNAL FOR THE STUDY OF ANIMAL PROBLEMS* 321-29 (1983).

73. *Washington v. Glucksberg*, 521 U.S. 702 (1997).

74. *Id.* at 731; see also *Krischer v. McIver*, 697 So.2d 97, 103 (Fla. 1997) (upholding Florida's statutory prohibition on physician assisted suicide; relying in part on state's "compelling interest in maintaining the integrity of the medical profession").

75. *Glucksberg*, 521 U.S. at 731 (quoting American Medical Association, Code of Ethics § 2.211 (1994)); see also NEW YORK TASK FORCE ON LIFE AND THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 105-07 (1994).

76. See JOHN KEOWN, *Euthanasia in the Netherlands: Sliding Down the Slippery Slope?*, in *EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES* 261-96 (John Keown ed., 1995).

77. This is one of those situations where, as utilitarian philosopher J.C.C. Smart has said, "we should probably dislike and fear a man who could bring himself to do the right utilitarian act . . . Though the man in this case might have done the right utilitarian act, his act would betoken a toughness and lack of squeamishness which would make him a dangerous person." J.J.C. SMART, *An Outline of a System of Utilitarian Ethics*, in *UTILITARIANISM: FOR AND AGAINST* 71 (1973).

Yet another related example is found in laws prohibiting the mistreatment of human corpses.⁷⁸ These laws generally prohibit any mistreatment of a corpse, regardless of whether the mistreatment affects the interests of any living relative and regardless even of whether the misconduct contravenes the wishes of the deceased.⁷⁹ Thus, mistreatment of a corpse is an offense not against the deceased or the deceased relatives but against the "public order."⁸⁰ Statutes prohibiting misconduct against a corpse are designed to express—and, I would suggest, to preserve—society's sense of revulsion at the undignified treatment of what was once a person. This revulsion is part and parcel of a broader moral reaction pattern that makes us averse to the mistreatment of other human beings, living or dead.⁸¹ This broader reaction pattern has tremendous social utility.

The process whereby the criminal law reinforces moral reaction patterns sometimes is multifaceted and mysterious. But, in these examples, at least one facet of the process is relatively mundane. What binds together the forgoing examples—laws prohibiting shooting at human silhouettes, cruelty to animals, physician-assisted suicide, and the mistreatment of corpses—is the fact that each form of conduct *resembles* the infliction of very tangible harm on other persons. It is an axiom of psychotherapeutic practice that a person may gradually be

78. See, e.g., ALASKA STAT. § 11.61.130. Prosecutions for mistreatment of a corpse are relatively rare. One recent example occurred in Cincinnati, where a professional photographer was prosecuted for "abuse of a corpse" after using corpses in "an artistic series intended to portray the cycle of life and death." Stephen Kinzer, *In Cincinnati, Art Bows to the Privacy of Death*, N.Y. TIMES, Aug. 3, 2002, at B7.

79. Laws prohibiting the mistreatment of corpses "do not increase the rights of kindred in the dead bodies of their relatives." 22A AM. JUR. 2d *Dead Bodies* § 4 (1988). Rather, they are said to "have as their objective the protection of the rights of the public." *Id.* See generally *State v. Hartzler*, 433 P.2d 231, 234–35 (N.M. App. 1967) (reviewing common-law origins of crime of indecent handling of dead body before upholding conviction for it).

80. ALASKA STAT. § 11.61.130 is included in Chapter 11.61, which is entitled "Offenses Against Public Order."

81. Probably the best evidence for the close relationship between respect for the living and respect for the dead is found in the persistence through history of human beings' revulsion toward the mistreatment of corpses. The Greek historian Herodotus remarked on the diversity of the methods by which societies express respect for their dead. But he also remarked on the uniformity and depth of the societies' revulsion toward any failure to comply with their specific method of expressing respect for the dead:

Darius, during his own rule, called together some of the Greeks who were in attendance on him and asked them what would they take to eat their dead fathers. They said that no price in the world would make them do so. After that Darius summoned those of the Indians who are called Callatians, who *do* eat their parents, and, in the presence of the Greeks (who understood the conversation through an interpreter), asked them what price would make them burn their dead fathers with fire. They shouted aloud, 'Don't mention such horrors!'

Herodotus, *Histories* (Book III) HERODOTUS, *THE HISTORY* 228 (David Grene trans., The University of Chicago Press 1987) (emphasis in original).

"desensitized" to her aversions by engaging in conduct that *resembles* the conduct to which she is averse.⁸² Thus, a person who is afraid of spiders might gradually be desensitized by being exposed in sequence to pictures of spiders, then rubber spiders, and finally real spiders.⁸³ Just so, a soldier who is averse to shooting other persons might be desensitized by shooting at human silhouettes or human effigies. If the criminal law can prevent or deter persons from taking the first, seemingly harmless step toward desensitization, it may ultimately prevent the deterioration of moral reaction patterns upon which society depends.

VI. A HARDER CASE: PARTIAL-BIRTH ABORTION

A final—and far more controversial—example of a law that arguably is justified by the need to preserve human beings' habitual aversion to physical violence is found in recent legislative efforts to regulate the location of fetal demise in abortion practice. The United States Supreme Court's decision in *Stenberg v. Carhart*, striking down Kansas's prohibition on the procedure known as "partial-birth abortion," did not resolve the core question posed by such statutes: whether it ever makes sense to regulate abortion on the basis of the fetus's location at the time of its death.⁸⁴ This question has not gone away, for Congress and several state legislatures have undertaken, with varying degrees of good faith, to fix the defects identified by the Supreme Court in *Carhart*.⁸⁵ It seems likely that the courts will be required eventually to address a statute that lacks the defects of the first generation of partial-birth bans, and whose constitutional validity can be determined only by evaluating its justification in policy.

The controversy over partial-birth abortion began in 1992, when Dr. Martin Haskell presented a monograph entitled "Dilation and Extraction for Late Second Trimester Abortion" at a risk management seminar conducted by the National Abortion Federation.⁸⁶ In this monograph, Dr. Haskell said he had developed "an alternative method

82. See, e.g., MANI FENIGER, JOURNEY FROM ANXIETY TO FREEDOM 131–58 (1997); AMERICAN COLLEGE OF PHYSICIANS, COMPLETE HOME MEDICAL GUIDE 969 (1999).

83. See HARVARD MEDICAL SCHOOL FAMILY HEALTH GUIDE, *supra* note 82, at 406.

84. 530 U.S. 914 (2000).

85. See Partial Birth Abortion Act of 2002, H.R. 4965, 107th Cong., 2d Sess. (2002); William Glaberson, *Foes of Abortion Start New Effort After Court Loss*, N.Y. TIMES, June 30, 2000, at A1; *Virginia Senate Passes Partial-Birth Abortion Ban*, CATHOLIC WORLD NEWS, Feb. 20, 2003, at <http://www.cwnnews.com> (last visited June 30, 2003).

86. The Partial-Birth Abortion Act of 1995: Hearing on H.R. 1833 before the Senate Judiciary Committee, 104th Cong., 1st Sess. (November 17, 1995) (hereinafter "1995 Senate Hearing") at 3, 5 (Haskell monograph).

for achieving late second trimester abortions.”⁸⁷ As described by Dr. Haskell, this method, which he referred to as “Dilation and Extraction,” or “D & X,” involves several steps.⁸⁸ First, the patient’s cervical opening is enlarged over the course of several days through the insertion of progressively larger cervical dilators.⁸⁹ During the operation itself, the surgeon first uses forceps to grasp one of the fetus’s “lower extremities,” that is, one of the fetus’s legs, and then pulls the leg into the vagina.⁹⁰ Next, “the surgeon uses his fingers to deliver the opposite lower extremity, then the torso, the shoulders, and the upper extremities.”⁹¹ The fetus’s head, which is too large to pass through the cervical opening, lodges inside the cervix. At this point, only the fetus’s head is inside the patient; the fetus’s body, which “is oriented dorsum or spine up,” is outside the mother and is visible to the doctor.⁹² After grasping the fetus by the shoulders and “push[ing] the anterior cervical lip out of the way,”⁹³ the doctor inserts the tip of a pair of scissors into the base of the fetus’s skull, then “spreads the scissors to enlarge the opening.”⁹⁴ The doctor removes the scissors and inserts a suction catheter in their place, then sucks out the fetus’s brain, thereby killing the fetus.⁹⁵ Once the brain has been removed, the fetus’s head no longer is too large to pass through the cervical opening. The doctor completes the delivery.

What distinguished Dr. Haskell’s method from traditional methods of abortion was that, in his procedure, partial delivery of the fetus preceded the killing of the fetus. Traditional methods of abortion had involved killing the fetus inside the uterus, by means of chemicals, dismemberment, or the severing of the umbilical cord.⁹⁶ Thus, in traditional methods of abortion, the killing of the fetus had taken place out of sight. For Congress, the killing of a fetus that was partly or mostly outside the mother bore a troubling resemblance to infanticide, particularly when the fetus was viable or nearly so.⁹⁷ It

87. *Id.* at 11.

88. *Id.* at 5.

89. *Id.* at 7.

90. *Id.* at 8.

91. *Id.*

92. *Id.*; see also 1995 Senate Hearing at 18 (testimony of Brenda Pratt Shafer, R.N.).

93. 1995 Senate Hearing, *supra* note 86, at 8 (Haskell monograph).

94. *Id.* at 9.

95. Dr. Haskell’s monograph contains no reference to the death of the fetus. But during a 1993 interview with the American Medical News, Dr. Haskell acknowledged that two thirds of the fetuses are not dead when he begins to remove them from the mother. 1995 Senate Hearing, *supra* note 86, at 23 (letter from Barbara Bolsen, editor of American Medical News).

96. 1995 Senate Hearing, *supra* note 86, at 6 (Haskell monograph).

97. The reason for Congress’s concern is apparent in the testimony of the first witness to testify in the 1995 Senate Hearing. Brenda Pratt Shafer, a registered nurse who had witnessed

was this wrong to which the Partial-Birth Abortion Ban Act of 1995 and its state counterparts were addressed.

Though much of the litigation over partial-birth abortion focused on the supposed⁹⁸ vagueness of the statutory language and the narrowness of the statutory exception for procedures necessary to preserve the mother's health, some courts also raised questions that went to the core of the statutes' rationale. In *Planned Parenthood v. Doyle*, Judge Richard Posner argued that the state could have no legitimate interest in regulating abortions on the basis of the location of the fetus.⁹⁹ That is, Judge Posner argued that the state could have no legitimate interest in requiring the physician to kill the fetus in the uterus rather than in the "birth canal":

If the state is right that there is always an equally safe alternative form of abortion to partial birth abortion, then the statute cannot discourage abortions—cannot save any fetuses—but can merely shift their locus from the birth canal to the uterus. What interest has the state in such a shift?¹⁰⁰

Judge Posner also pointed out that there is no basis for assuming that "if a fetus feels pain, the pain is worse when the fetus is killed in the birth canal than when death occurs a moment earlier in the womb."¹⁰¹

As a preliminary matter, Judge Posner's reference to the "birth canal" is euphemistic and somewhat misleading. In the procedure described by Dr. Haskell, only the fetus's head remains inside its mother; the rest of the fetus, including its shoulders and arms, is outside the mother, on the operating table.¹⁰² But this point alone obviously is not a complete answer to Judge Posner, because Judge Posner's argument is forceful even as applied to a fetus located mostly outside its mother; it is difficult to see "[w]hat interest the state has" in shifting the locus of the abortion from the operating table to the womb.

Judge Posner is not alone in arguing that the location of the fetus should not make a difference. Philosopher Peter Singer, for example,

the procedure during her employment at Dr. Haskell's clinic, testified that during the procedure everything but the fetus's head was visible. "The baby's little fingers were clasp[ing] and unclasp[ing], and his little feet were kicking." One of the procedures she had witnessed involved a fetus at 26 weeks' development. 1995 Senate Hearing, *supra* note 86, at 18.

98. See Case Comment, *Sixth Circuit Strikes Down Ohio Ban of Post-Viability and Dilation and Extraction Abortions: Women's Medical Professional Corp. v. Voinovich*, 112 HARV. L. REV. 731, 736 (1999) (criticizing view that Ohio ban was unconstitutionally vague).

99. *Planned Parenthood v. Doyle*, 162 F.3d 463, 470 (7th Cir. 1998).

100. *Id.*

101. *Id.*

102. 1995 Senate Hearing, *supra* note 86, at 8 (Haskell monograph).

has argued "[t]he location of a being—inside or outside the womb—should not make that much difference to the wrongness of killing it."¹⁰³ Singer points out that "the fetus/baby is the same entity, whether inside or outside the womb, with the same human features (whether we can see them or not) and the same degree of awareness and capability for feeling pain."¹⁰⁴ According to Singer, the only possible justification for assigning significance to the fetus's location at the time of death is something akin to good taste: "we are less disturbed at the destruction of a fetus we have never seen than at the death of a being we can all see, hear, and cuddle."¹⁰⁵

The best answer to Posner and Singer is that regulation of the locus of fetal demise is justified to preserve our sense of revulsion at the destruction of a human being "we can all see." Revulsion at the killing of something that is *visibly* human already is part of the moral intuitions of most human beings, as was apparent from testimony at congressional hearings on partial-birth abortion.¹⁰⁶ Indeed, even Judge Posner has acknowledged that the ability to *see* the fetus affects our moral intuitions about the wrongness of killing it:

As we learn more about the fetus—as science makes the womb more transparent to us—we are likely to feel a stronger empathy for it, to see it more as a baby (that two-inch-long fetus is recognizably human), to feel in short the tug of the analogy to infanticide, and hence to rate the fetus's claims higher than when it could be regarded as a formless lump of tissue.¹⁰⁷

Judge Posner also has acknowledged that the government may have a legitimate interest in preserving "the moral repugnance that most of us feel toward infanticide and euthanasia—more broadly, the elimination of inconvenient persons."¹⁰⁸ The deterioration of this fiber of the social fabric would be dangerous, particularly since infanticide already is very common, both in the United States and abroad.¹⁰⁹

103. PETER SINGER, PRACTICAL ETHICS 139 (2d ed. 1993).

104. *Id.*

105. *Id.* at 138.; See also Michael Tooley, *In Defense of Abortion and Infanticide*, in THE ABORTION CONTROVERSY 209–33 (Pojman & Beckwith eds. 1998).

106. 1995 Senate Hearing, *supra* note 86, at 18.

107. RICHARD POSNER, SEX AND REASON 290 (1992).

108. *Id.* at 288.

109. See, e.g., Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Toward (An)other Vision*, 23 COLUM. HUMAN RIGHTS L. REV. 249, 256, 256 n.26 (1991–92); Daniel Maier-Katkin & Robbin Ogle, *A Rationale for Infanticide Laws*, 1993 CRIM.L.REV. 903 (in Great Britain "the homicide rate among children under the age of one year is greater than that of any other age group"); Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 34 AMER. CRIM. L. REV. 1, 22 (1996) ("an extraordinarily high number of infants are killed within twenty-four hours of birth").

The argument, in short, is that statutes governing where the fetus is killed—that is, requiring the physician to kill the fetus in the mother's womb, rather than on the operating table—advance the state's powerful interest in inculcating in its citizens an aversion to the killing of a human being “we can all see.” Just as cruelty to animals has “a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those acts,”¹¹⁰ the killing of a fetus in plain sight, where its resemblance to a human being is unmistakable, has a tendency to dull feelings of revulsion that are essential to human society.¹¹¹

This is not to say, however, that laws prohibiting partial-birth abortion would pass constitutional muster. Restrictions on partial-birth abortion are constitutionally problematic for a number of reasons, among them the fact that restrictions on the right to abortion often are driven by discrimination against women.¹¹² Indeed, one of the foregoing examples—laws prohibiting cruelty to animals—provides a possible basis for an inference of discrimination. Laws prohibiting cruelty to animals generally contain an exception for cruelty that occurs during the course of scientific research or veterinary practice.¹¹³ This exception suggests that legislatures are relatively unconcerned about the impact on public morals of events that occur in a scientific laboratory or a doctor's office. Thus, it could be argued that the legislature's decision to concern itself with the moral import of what happens in the office of the abortion practitioner is evidence of discrimination against women.

My intent, in making this argument, is not to resolve the question whether a well-drafted prohibition on partial-birth abortion would survive a constitutional challenge. Rather, my intent is merely to identify some situations where regulation might be justified in the

110. *Knox v. Mass. Soc'y for Prevention of Cruelty to Animals*, 425 N.E.2d 393, 396 (Mass. App. Ct. 1981) (citation omitted).

111. In *Evans v. Kelley*, 977 F.Supp. 1283, 1319 n.38 (E.D. Mich. 1997), the district court acknowledged the offensiveness and inhumanity of partial-birth abortion, though it struck down the Michigan statute for lack of a culpable mental state. The district court in *Evans* explained:

In the court's view, the intact D&E procedure is gruesome and inhumane and society, through its elected representatives, should be able to circumscribe its utility. Indeed, even Plaintiffs' expert, Dr. Doe, testified that the intact D&E is a particularly hideous procedure. [5/5/97 Tr. 54-55.] (“This is a destructive surgery. . . . It's bloody, It's destructive. . . . It is unpleasant.” *Id.*) . . . The court believes that the Michigan Legislature may constitutionally regulate abortion practice in Michigan. . . .

112. See SUNSTEIN, *supra* note 29, at 114; Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N. CAR. L. REV. 375, 382-83 (1985).

113. ALASKA STAT. § 11.61.140, which prohibits cruelty to animals, contains exceptions for conduct that “conform[s] to accepted veterinary or animal husbandry practice” and for conduct that is “part of scientific research governed by accepted standards.”

name of protecting the social fabric. My concern here is with the general validity of the argument from the social utility of moral reaction patterns. Accordingly, I will next undertake a more detailed analysis of the general form of the argument and its underpinnings.

VII. THE UNDERPINNINGS OF THE ARGUMENT IN ITS GENERAL FORM

In its general form, the argument for the preservation of moral reaction patterns rests primarily on three assumptions about why ordinary people generally refrain from conduct injurious to others. The first of these assumptions is that *people generally do not calculate the risk of apprehension and punishment before deciding, in a particular instance, to refrain from committing a serious crime*. This assumption is justified in part by the fact that people who have no familiarity whatever with the very complex statutes that govern assault, murder, and sexual abuse generally have no difficulty in living up to the law's expectations. The assumption also is borne out by our personal experience. When a stranger talks during a movie, say, or cuts in line, even the best of us sometimes will wish harm on him. But we do not seriously consider taking up arms ourselves, nor would we even if we could be certain of escaping punishment. People can quarrel about whether it is "morality" that stops us or something else. What is essential for purposes of this assumption is merely that what stops us—whatever it may be—is not the criminal law itself.

Just as the ordinary person generally does not calculate the risk of apprehension and punishment before deciding, in a particular instance, to refrain from committing a serious crime, nor does she generally calculate the short- and long-term social costs and benefits of the crime. She does not attempt to calculate, for example, whether in the long run the world might be a better place without the stranger who talks during the movie or cuts in line. This is the second assumption upon which the general argument depends: *our everyday decisions to refrain from conduct harmful to others generally are based not on "critical moral thinking," but on simple, habitual patterns of response*.¹¹⁴ Our experience as moviegoers and line-standers tells us that we *do not* make these calculations. And common sense tells us that we *could not*. As philosopher R.M. Hare has explained, the "formation in ourselves of relatively simple reaction patterns" is "an indispensable help in coping with the world."¹¹⁵

114. The phrase "critical moral thinking" is drawn from R.M. HARE, *MORAL THINKING* 44-47 (1981).

115. *Id.* at 36.

In real life, we usually cannot foresee all the complexities of our choices. It is simply not practical to try to calculate the consequences, in advance, of every choice we make. Even if we were to limit ourselves to the more significant choices, there would be a danger that in many cases we would be calculating in less than ideal circumstances.¹¹⁶

From the fact that most potential crimes are prevented by these “relatively simple reaction patterns”—rather than by the criminal law itself or by critical moral thinking—we can infer that government has a legitimate interest in preserving these reaction patterns in its citizens.¹¹⁷ Hare explains this point using the fiction of an all-knowing “archangel,” who is capable of perfect critical moral thinking:

If we wish to ensure the greatest possible conformity to what an archangel would pronounce, we have to try to implant in ourselves and in others whom we influence a set of dispositions, motivations, intuitions, *prima facie* principles (call them what we will) which will have this effect. We are on the whole more likely to succeed in this way than by aiming to think like archangels on occasions when we have neither the time nor the capacity for it.¹¹⁸

Though Hare himself seems to have in mind the “influence” exerted by moral discourse, his insight also is relevant to government policy. If the two foregoing assumptions are valid, then these relatively simple moral reaction patterns—not the criminal law itself and not critical moral thinking—are the fabric that binds society together. Government must, therefore, be concerned with the effect of its actions (or omissions) on these reaction patterns.

(Though I refer to these simple reaction patterns as “moral,” this terminology is mostly a matter of convenience. By the phrase “moral reaction pattern,” I mean only to isolate those reaction patterns that tend to prevent harm to other persons and that, for that reason, are socially useful. I do not mean to imply that the patterns must be related to moral principles or must have their source in some moral faculty. I assume, then, with Professor Jhos Andenaes, that “[u]nconscious inhibitions against committing forbidden acts can also be aroused without appealing to the individual’s concepts of morality.”¹¹⁹ Indeed, it seems likely to me that the aversion to incest,

116. SINGER, *supra* note 103, at 92-93.

117. HARE, *supra* note 114, at 36.

118. *Id.* at 46-47.

119. Jhos Andenaes, *General Prevention – Illusion or Reality?* 43 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 176, 179 (1952) (“Unconscious inhibitions against committing forbidden acts can also be aroused without appealing to the individual’s concepts of morality.”)

to which I already have referred as a moral reaction pattern, might be perceived by many individuals as wholly unrelated to morality.¹²⁰)

How, then, is government to advance its interest in preserving and cultivating moral reaction patterns in its citizens? The answer lies in a third critical assumption: that *the criminal law plays some role, albeit a rather mysterious one, in the preservation and cultivation of these moral reaction patterns*.¹²¹ The best evidence for this assumption lies in its widespread impact on both the drafting of criminal codes and the punishment of individual offenders. The Model Penal Code, for example, is based in part on the assumption that the criminal law prevents crime "by fortifying normal instincts to refrain from injurious behavior."¹²² In the courts, this assumption rises to the surface when a severe sentence is justified by the need for "reaffirmation of societal norms."¹²³ The assumption is not a thoughtless one: academics long have argued that the inculcation of moral reaction patterns in the citizenry as a whole is among the most important reasons for punishing serious criminals.¹²⁴

Even if one accepts these three assumptions, however, the question remains why the government would have an interest in preserving or cultivating broad moral reaction patterns that, like the aversion to incest, discourage even harmless activities. Would not the public interest be equally served by the cultivation of slightly narrower, slightly more complex reaction patterns that discourage only harmful conduct? In the case of incest, for example, would not the public interest be equally served by the cultivation of an aversion to

Purely as a matter of habit, with fear, respect for authority or social imitation as connecting links, it is possible to induce favorable attitudes toward this or that action and unfavorable attitudes toward another action.").

120. See WILLIAM IAN MILLER, *THE ANATOMY OF DISGUST* 15 (1997).

121. This third assumption is not inconsistent with my first assumption. That is, there is nothing inconsistent about assuming both (1) that we generally do not directly consider the law itself before deciding whether to inflict harm on others; and (2) that the habitual reaction patterns that do drive our conduct are shaped by our knowledge of cases where others have been criminally punished.

122. MODEL PENAL CODE § 1.02, comt. at 21 (1985).

123. See, e.g., *State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970) (identifying as one of the objectives of sentencing the "reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves").

124. See Andenaes, *supra* note 119, at 180 (among the criminal law's general preventative effects is its tendency to "strengthen moral inhibitions" and to "stimulate habitual law-abiding conduct." "To the lawmaker, the achievement of inhibition and habit is of greater value than mere deterrence."); John L. Diamond, *The Crisis in the Ideology of Crime*, 31 IND. L. REV. 291, 291-92 (1998) ("It is the contention of this article that criminal law is the primary institution for transmitting social ideology. . . . Criminal law is society's synthesis of what is evil and taboo as opposed to respectable Ultimately criminal law is the instrument by which the definitions of social morality are woven.").

sexual intercourse among *fertile* relatives, along with an aversion to sexual imposition upon the young?

The answer is that it is unclear whether moral reaction patterns are so easily manipulated. It is unclear, that is, whether the introduction of new distinctions—designed to differentiate harmful from harmless conduct—would make it more difficult for the narrower principles to take root as habitual patterns of reaction. Again, incest suggests itself as an example. It seems possible, if not probable, that the introduction of new distinctions—between fertile and infertile relatives, and between youthful and mature relatives—would weaken the aversion to incest. In any event, it is difficult for us to imagine that a person who felt no aversion whatever toward sexual intercourse with an immediate relative who was over 21 and infertile would feel as strongly averse as we do toward sexual intercourse with an immediate relative who is fertile or is *under* 21. At the very least, one has to concede that this person's reaction pattern would be fundamentally different from our own. We are not, then, really talking about fine-tuning the aversion to incest. We are talking about trying to replace the existing aversion with a different one, which might or might not take root as deeply.

This step in the argument does not require the adoption of any particular theory of psychology or human nature. Rather, it requires only an acknowledgment that the origins and persistence (and occasional disappearance) of moral reaction patterns are, at present, a matter of considerable uncertainty. And *this* acknowledgment cannot be withheld. It cannot reasonably be denied that some rules take root as reaction patterns and others—say, the rule that forbids sexual imposition on teenage girls—mysteriously fail to take root. Nor can it reasonably be denied that our society would be a different place—perhaps better and perhaps much worse—if we really had the power to implant reaction patterns at will. It is only a little bit less true today than when Kant famously said it that the “moral law” within us is a source of “wonder and awe.”¹²⁵ It is a mystery why people are not much worse than they are.

What is more, people really *could be* much worse. To anyone who has worked in the criminal justice system, it is obvious that some individuals inexplicably lack ordinary moral reaction patterns and that these individuals can be very dangerous. Further, history teaches that

125. IMMANUEL KANT, CRITIQUE OF PRACTICAL REASON 166 (Lewis White Beck trans., The Liberal Arts Press 1956) (“Two things fill the mind with ever new and increasing admiration and awe, the oftener and more steadily we reflect on them: the starry heavens above me and the moral law within me.”).

the absence of critical moral reaction patterns can be characteristic of a community as a whole, at least for periods of time. I am thinking particularly of Nazi Germany and of recent events in Bosnia and Rwanda (and of Primo Levi's warning: "It happened, therefore it can happen again. . . . It can happen, and it can happen everywhere."¹²⁶). These and other examples demonstrate that there is something to fear in the possibility that efforts to replace existing moral reaction patterns with new, more enlightened moral reaction patterns might succeed only in eliminating the existing patterns.

In its emphasis on uncertainty and on the fragility of the social fabric, this argument resembles arguments for preservation of the environment. Like many arguments for preservation of the environment, this argument depends not on any affirmative prediction of the consequences of a particular action, but on a conviction that the consequences cannot be predicted with any certainty, together with a sense of the gravity of any miscalculation. Philosopher Simon Blackburn has nicely drawn out this analogy:

We have all learned to become sensitive to the physical environment. We know that we depend upon it, that it is fragile, and that we have the power to ruin it, thereby ruining our own lives, or more probably those of our descendants. Perhaps fewer of us are sensitive to what we might call the moral or ethical environment. This is the surrounding climate of ideas about how to live. It determines what we find acceptable or unacceptable, admirable or contemptible. It determines our conception of when things are going well and when they are going badly. It determines our conception of what is due to us, and what is due from us, as we relate to others. It shapes our emotional responses, determining what is a cause of pride or shame, or anger or gratitude, or what can be forgiven and what cannot.¹²⁷

This analogy is compelling. Nobody would deny, I hope, that our continued survival depends as much on the "moral environment" as on the physical one. As Professor H.L.A. Hart has said, "society could not exist without a morality which mirrored and supplemented the law's proscription of conduct injurious to others."¹²⁸ Nor would anyone familiar with human history deny that our "moral environment" is fragile. Finally, no one can be confident about our ability to reconstruct a new "moral environment" from scratch. From

126. PRIMO LEVI, *THE DROWNED AND THE SAVED* 199 (Raymond Rosenthal trans., Summit Books 1986).

127. SIMON BLACKBURN, *BEING GOOD* 1 (2001).

128. H.L.A. HART, *LAW, LIBERTY AND MORALITY* 51 (1963).

these premises, it makes sense to infer that, at least in some situations, we should endeavor to preserve as best we can some of the moral reaction patterns we already have.

But the argument for preservation of specific moral reaction patterns also is different from arguments for preservation of the physical environment, and these differences are both important and illuminating. For one thing, arguments for the preservation of the physical environment often are based not only on the instrumental value of the physical environment to human beings—as a source of human sustenance and shelter—but also on the intrinsic value of nature itself. In this respect, the moral conservationist's argument differs from the environmentalist's, as it must if it is to be consistent with *Ravin's* major premise. In the *Ravin* calculus, a moral principle lacks any intrinsic value. Thus, a law cannot be justified merely for the sake of preserving morality *qua* morality. At most, *Ravin* permits us to argue that the preservation of moral reaction patterns sometimes is justified by the patterns' utility in preventing tangible harm to human beings.

But the differences go deeper. Arguments for the preservation of the physical environment often assume that *every* aspect of the environment has instrumental value to human beings. And rightly so. Because the physical environment really is a seamless web, any substantial change in the environment has the potential eventually to make the planet uninhabitable. Thus, the lowly snail darter is as worthy of preservation as the panda, despite the fact that most human beings derive little direct pleasure from its existence. In contrast, arguments for preservation of the "moral environment" *must* assign very different values to different elements of the existing moral environment, for some of those elements are valuable, some are valueless, and some have a negative value. Moreover, some ostensibly "moral" reaction patterns are fundamentally (i.e., not situationally) inconsistent with one another; thus, society cannot cultivate one without damaging the other.

To illustrate, we plainly are better off for the elimination of many ostensibly "moral" convictions about the place of women in society. The continued cultivation of Victorian morality would have prevented the flowering of the very valuable—and truly moral—conviction that women should not be treated differently than men. Likewise, we would be far better off without the ostensibly "moral" aversion to other people's homosexuality. Granted, this aversion can coexist with the conviction that homosexuals deserve, in theory, to enjoy the same rights and privileges as heterosexuals. Thus, some judges have struck

down sodomy statutes as unconstitutional while simultaneously expressing their personal aversion to sodomy.¹²⁹ But common sense tells us that we would be better able to observe the moral imperative of tolerance if the homosexuality of others were a matter of indifference to us.

Further, even situational inconsistency among moral reaction patterns would make it impossible for the "moral conservationist" to maintain an attitude akin to the environmentalist's indiscriminating reverence for nature. In the case of partial-birth abortion, for example, our aversion to the destruction of creatures resembling human beings comes directly into conflict with our sense of compassion toward women who are unhappily pregnant. Abortion—even partial-birth abortion—can be an act of profound caring toward a person in great distress.¹³⁰ Thus, in deciding whether to permit or forbid partial-birth abortion, we must choose between fostering an aversion to the destruction of creatures resembling human beings and fostering compassion toward people in distress. In this setting, we cannot do both.

So I am not arguing that punishment can or should be used to safeguard every aspect of this society's moral code as it exists at this particular moment in history.¹³¹ I am not, that is, advancing a version of "legal moralism."¹³² I am merely arguing that some existing human reaction patterns have social utility and so are worth preserving. Whether a particular reaction pattern can be described as "moral" is not dispositive of the question whether it deserves protection, nor even very helpful. Any particular moral principle must be assessed for social utility, as Robert Wright has explained:

We should, in the end, dispense with those norms that don't make practical sense, but in the meanwhile we should recognize that norms often do make practical sense; they have grown out of an informal give and take that, though never purely democratic, is sometimes roughly pluralistic. What's more, this implicit negotiation probably took into account some (perhaps harsh) truths about human nature that may not at first be

129. See, e.g., *Powell v. State*, 510 S.E.2d 18, 25 (Ga. 1998) ("if we were called upon to pass upon the propriety of the conduct herein involved, we would not condone it").

130. See FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* 73 (R.J. Hollingdale trans., Penguin Books 1979) ("One has been a bad spectator of life if one has not also seen the hand that in a considerate fashion—kills.").

131. See HART, *supra* note 128, at 72 (1963) (arguing against "[t]he use of legal punishment to freeze into immobility the morality dominant at a particular time in a society's existence").

132. BLACK'S LAW DICTIONARY 906 (7th ed. 1999) (defining "legal moralism" as "[t]he theory that a government or legal system may prohibit conduct that is considered immoral").

apparent. We should look at moral axioms the way a prospector looks at shiny rocks—with great respect and great suspicion, a healthy ambivalence pending further, and urgent, inspection.¹³³

VIII. THE ARGUMENT'S ROLE IN JUDICIAL REVIEW

Until now, I have focused primarily on the question whether efforts to preserve existing moral reaction patterns sometimes make sense as a matter of policy. But the viability of policy arguments for "moral preservation" does not wholly answer the question whether these arguments have a legitimate role to play in judicial review. There are, in particular, two possible objections to relying on these arguments as the basis for sustaining legislation on judicial review. First, legislatures rarely, if ever, articulate utilitarian arguments for the preservation of moral reaction patterns; instead, when confronted by issues like partial-birth abortion, assisted suicide, and incest, they typically advance arguments that appear to be naively moralistic. Second, validating legislation on the basis of arguments for the preservation of moral reaction patterns could be said to place the courts in the position of colonial administrators who cultivate their subjects' superstitions and taboos for the sake of keeping the subjects under control. In my view, however, neither of these objections ultimately is persuasive.

The first concern seems unlikely to trouble the courts. It is not the usual practice of courts to require the legislature to explain the basis for its enactments.¹³⁴ And even those courts most inclined to closely scrutinize legislation usually have not limited their review to rationales articulated by the legislature itself.¹³⁵ In *Isaakson v. Rickey*,

133. ROBERT WRIGHT, *THE MORAL ANIMAL* 362 (New York: Vintage, 1994). The same point is made by Professor Smart: "We may consider whether it may not be better to throw our weight on the side of the prevailing traditional morality, rather than on the side of trying to improve it with the risk of weakening respect for morality altogether. Sometimes the answer to this question will be 'yes', and sometimes 'no.'" J.C.C. Smart, *An Outline of a System of Utilitarian Ethics*, in *UTILITARIANISM: FOR AND AGAINST* 51 (1973).

134. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 594 (1995) (Thomas, J., dissenting) ("It is not the usual practice of this Court to require Congress to explain why it has chosen to pursue a certain policy.").

135. There are good reasons for this. See Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Because legislatures comprise many members, they do not have 'intent' or 'designs,' hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes."); Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1, 46 (1972) ("The model asks that the Court assess the rationality of the means in terms of the state's purposes, rather than hypothesizing conceivable justifications on its own initiative. But identifying the purposes against which the means are to be measured is not a simple

for example, the Alaska Supreme Court expressed its unwillingness to validate questionable legislation on the basis of "imaginable facts."¹³⁶ But the phrase "imaginable facts" was drawn from a law review article by Professor Gunther,¹³⁷ who did *not* argue that "the only judicially cognizable purpose [would] be one explicitly set forth in a statutory preamble or the legislative history."¹³⁸ Gunther said, and the Alaska Supreme Court evidently assumed, that a description of the legislation's purpose by the state attorney general's office would be sufficient to trigger deference by the courts.¹³⁹

Further, a legislator's expression of revulsion at, say, partial-birth abortion or incest is not exactly beside the point. The argument for preservation of a moral reaction pattern often will begin with evidence that the activity to be prohibited actually *does* evoke a particular reaction in a large number of people. Thus, a legislator who expresses revulsion on behalf of her constituency takes a first, critical step toward the conclusion that the legislation is justified to preserve an existing reaction pattern. Moreover, the strength of the legislator's avowed sense of revulsion could conceivably provide some indication whether the activity to be prohibited really strikes at the core of an important—i.e., socially useful—reaction pattern. Indeed, I suspect that, in any particular case, even a *judge's* willingness to credit the abstruse logic of the argument for moral conservation will be roughly proportional to the strength of her own sense of revulsion at the activity to be prohibited.

No real difficulty arises, then, from the gap between the naïve moralizing of legislators and the high-minded utilitarianism of the courts. But what of the gap between the *citizenry* and the courts? Does not the argument for moral preservation put the courts in roughly the position of colonial administrators, who maintain order by cultivating the natives' beliefs in primitive taboos?¹⁴⁰ The concern here is that the process is undemocratic. Judges—so this counterargument goes—would be required to uphold a statute for the sake of instilling moral principles that the judges themselves do not believe in. The citizens, meanwhile, would continue to support the

undertaking. . . . The obstacles to judicial inquiry into motivation are formidable here as elsewhere.") (footnotes omitted; emphasis in original).

136. *Isaakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976).

137. Gunther, *supra* note 135, at 20.

138. *Id.* at 47.

139. *Id.* ("A state court's or attorney general office's description of purpose should be acceptable.").

140. Bernard Williams, *A Critique of Utilitarianism*, in *UTILITARIANISM: FOR AND AGAINST* 138 (1973).

statute only because they had effectively been duped by the courts into believing in the moral principles that correspond to the law.

The argument for moral preservation does not, thankfully, require judges to dupe the citizenry. The force of the comparison to colonial administrators is derived in part on the erroneous assumption that moral reaction patterns depend upon certain beliefs—say, about the existence of immutable moral principles handed down by some divine authority. But moral reaction patterns do not, or need not, depend on such beliefs, for even the strictest utilitarian can believe in the efficacy of inculcating simple reaction patterns in *herself*. Again, as Professor Hare argued: “If we wish to ensure the greatest possible conformity to what an archangel would pronounce, we have to try to implant in *ourselves* and in others whom we influence a set of dispositions, motivations, intuitions, *prima facie* principles (call them what we will) which will have this effect.”¹⁴¹ There need be no divide, then, between the people who make the decision to inculcate the moral reaction pattern and the people in whom the moral reaction pattern is inculcated. They can be members of the same community, who, in their communal wisdom, elect to inculcate certain reaction patterns in themselves.

Experience bears out the assumption that human beings often attempt to implant reaction patterns in themselves. Even the most nihilistic lawyer will, if she has any hope of succeeding in her career, attempt to inculcate in herself a powerful visceral aversion to lying in court. Without this visceral aversion, she occasionally will be misled by the perceived benefits of lying; she will miscalculate.¹⁴² The necessity of inculcating this reaction pattern in herself will become forcefully apparent to any lawyer caught by a judge in a lie. But even a lawyer who succeeds in deceiving a judge will, we hope, have a crisis of conscience; she will be troubled and frightened by her very *ability* to lie in court, and she will attempt, by inculcating a reaction pattern in herself, to eliminate this ability. Likewise, a lawyer who learns that she is perceived by judges as arrogant might try to cultivate an abiding sense of humility. And a lawyer who drinks too much might try to cultivate an aversion to alcohol.

Further, even if we suppose that some moral reaction patterns are linked to beliefs about the world and even if we suppose further that

141. See HARE, *supra* note 114, at 46-47 (emphasis added).

142. SINGER, *supra* note 103, at 92-93. (“In real life, we usually cannot foresee all the complexities of our choices. It is simply not practical to try to calculate the consequences, in advance, of every choice we make. Even if we were to limit ourselves to the more significant choices, there would be a danger that in many cases we would be calculating in less than ideal circumstances.”).

nobody would try to inculcate in herself a belief she did not already possess,¹⁴³ the utilitarian argument for the cultivation of moral reaction patterns still need not create a divide between judges and the people they govern. *Ravin* and its counterparts in other states do not assume that judges lack non-utilitarian moral beliefs. Rather, these decisions assume only that the judges' non-utilitarian moral beliefs are not a legitimate basis for judicial decision. Indeed, in *Ravin* itself the Alaska justices who joined the majority opinion expressed their *personal* moral conviction that the use of marijuana is wrong.¹⁴⁴ Thus, in the unlikely event that a judge sustained a statute on the basis of a utilitarian argument for the preservation of moral *beliefs*, the judge would not necessarily be acting the part of a colonial administrator. She might really share the belief to be preserved.¹⁴⁵

Finally, the punishment of otherwise harmless conduct for the sake of preserving broad moral reaction patterns is not so different from the enforcement of broad general statutes in cases where they work an apparent injustice. It has never been a ground for challenging a statute that it yields irrational results in the case under consideration. Substantive due process is satisfied when the general classification scheme itself "is not arbitrary but instead based on some rational policy."¹⁴⁶ In other words, "[t]he test is not whether the statute, as applied to the individual . . . , relates to a legitimate government interest, but rather whether the classification created by the statute which encompasses the [individual] is so related."¹⁴⁷ If we can accept general statutes that sometimes require the punishment of harmless or even superficially beneficial conduct, then there is no reason in principle why we cannot accept general statutes that punish entire categories of conduct that is harmless.

IX. CONCLUSION: RAVIN REDUX

The Alaska Supreme Court deserves praise for holding in *Ravin* that "[t]he state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in

143. *But cf.* WILLIAM JAMES, THE WILL TO BELIEVE AND OTHER ESSAYS IN POPULAR PHILOSOPHY 1-31, 19 (1897) ("I can believe that worse things than being duped may happen to a man in this world").

144. *Ravin*, 537 P.2d at 511-12.

145. See Williams, *supra* note 140, at 138 (discussing the "prospect of a society which is utilitarian in government but less so in personal morality").

146. *Concerned Citizens of S. Kenai Peninsula v. Kenai Peninsula Borough*, 527 P.2d 447, 452 (Alaska 1974).

147. *Peed v. Cleland*, 516 F.Supp. 469, 476 (D. Md. 1981). See also *Briscoe v. Prince George's County Health Dep't*, 593 A.2d 1109, 1114 (Md. 1991).

the affairs of those individuals.”¹⁴⁸ The court deserves praise not least because this holding is a “moral” one in the profoundest sense of the word. A jurisprudence utterly divested of morality—a cold utilitarian reckoning of costs and benefits—would assign weight indiscriminately to every sort of pain and pleasure,¹⁴⁹ including the real pain many of us suffer from perceiving the transgression by others of rules of “social propriety,” and including the real pleasure we derive from the punishment of such transgression. In *Ravin* the court denied any weight to these base pains and pleasures.¹⁵⁰ In so doing, it made the moral imperative of tolerance a polestar of Alaska’s constitutional jurisprudence.

But the acceptance of *Ravin*’s major premise does not require us to adopt too the court’s seeming contempt for every virtue but tolerance, as expressed in the court’s equation of “morality” with “propriety” and “fashion.” The *Ravin* court’s insistence upon harm as a prerequisite to government regulation is entirely consistent with its acknowledgment that harm can be inflicted indirectly, through harm to “the fabric of society.”¹⁵¹ And its acknowledgment that harm can be inflicted indirectly provides a rationale for government action that is designed to preserve existing moral reaction patterns. In some cases, this rationale will be compelling. The social utility of the existing aversion to incest—in preventing sexual imposition on family members—probably justifies a broad statutory prohibition on incest, given the relatively slight benefits to be derived from expanding marginally the range of available sexual partners. Likewise, the social utility of the aversion to shooting other people likely outweighs the interest of gun owners in using human silhouettes for target practice.

The same rationale, finally, supplies the best explanation why *Ravin*’s central holding—that adults have a constitutional right to smoke marijuana—has won no adherents among other courts. A prohibition on the use of even “harmless” psychoactive drugs might well be justified to preserve an existing aversion to what I will call, for lack of a better term, diminished consciousness. The existence of this general aversion can be inferred from *Ravin* itself, when the justices of the Alaska Supreme Court expressed their *personal* convictions that

148. *Ravin*, 537 P.2d at 509.

149. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 66 (1987) (identifying “commitment to the subjectivity and arbitrariness of preferences” as one of the central articles of faith of liberal individualism).

150. The same refusal to assign weight to these pains and pleasures is evident in the Alaska courts’ “principle of parsimony,” which precludes a sentencing judge from imposing a sentence whose length cannot be justified by the goals of sentencing, e.g. rehabilitation, deterrence, and reaffirmation of societal norms. See *Pears v. State*, 698 P.2d 1198 (Alaska 1985).

151. *Ravin*, 537 P.2d at 509.

psychoactive drugs impair our ability “to live responsibly, for our own sakes and for society’s.”¹⁵² This conviction, however personal, has very substantial social utility, for it would appear to be what chiefly prevents us from using substances that, unlike marijuana, *are* harmful both to the user and other individuals. By licensing the use of marijuana, the *Ravin* court arguably contributed to the deterioration of this moral reaction pattern.

152. *Id.* at 511–12. If scientific evidence for this proposition were necessary—it is not—it could be found in a very recent study of Australian twins, which showed that early marijuana users were up to five times more likely to move to harder drugs than were their twins. Michael Lynskey, et al., *Escalation of Drug Use in Early-Onset Cannabis Users vs. Co-twin Controls*, 289 JAMA 427 (2003).